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Philippine Regulations for Cross-Border Digital Platforms: Impact and Reform Considerations

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Please address all inquiries to:

Philippine Institute for Development Studies
18th Floor, Three Cyberpod Centris - North Tower
EDSA corner Quezon Avenue, 1100 Quezon City
Telephone: (63-2) 8877-4000
Fax: (63-2) 8877-4099
E-mail: publications@mail.pids.gov.ph
Website: https://www.pids.gov.ph

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Editorial and production team:
Sheila V. Siar, Gizelle G. Manuel, and Wenilyn M. Asuncion

Table of Contents

List of Tables

List of Acronyms

AES	Advanced Encryption Standard
ASEAN	Association of Southeast Asian Nations
BSFIs	BSP-supervised financial institutions
BSP	*Bangko Sentral ng Pilipinas*
CEZA	Cagayan Economic Zone Authority
DICT	Department of Information and Communications Technology
DOTr	Department of Transportation
DPA	Data Privacy Act
DTI	Department of Trade and Industry
EMIs	electronic money issuers
EO	Executive Order
FINL	Foreign Investment Negative List
GII	Global Innovation Index
GovCloud	Government Cloud
ICT	information and communications technology
IP	intellectual property
IPOPHL	Intellectual Property Office of the Philippines
IRR	implementing rules and regulations
ITSO	Innovation and Technology Support Offices
MSMEs	micro, small, and medium enterprises
NCIPR	National Committee on Intellectual Property Rights
NIASD	National Innovation Agenda and Strategy Document
NIC	National Innovation Council
NPC	National Privacy Commission
OECD	Organisation for Economic Co-operation and Development
POC	proof of concept
RA	Republic Act
SEC	Securities and Exchange Commission

TNCs	transportation network companies
TNVS	transport network vehicle services
UNCTAD	United Nations Conference on Trade and Development
USD	United States dollar
VA	virtual asset
VAS	virtual asset service
VASPs	virtual asset service providers
WIPO	World Intellectual Property Office
WTO	World Trade Organization

Abstract

This paper reviews Philippine regulations governing digital platforms with cross-border operations and the impacts of these laws on the ability of platforms to innovate and participate in the global economy. There is no shortage of constitutional, statutory, and policy support for innovation, e-commerce, digitization, and entrepreneurship. However, there is a disconnect between these policies and the environment created by how implementing statutes and regulations evolved.

Existing banking and financial services laws, consumer protection, cybersecurity, and data privacy support digital platform operations. Despite this, digital platforms could benefit further if the country's data privacy regulations are assessed in light of incongruences with the data protection and privacy regulations of neighboring countries in Southeast Asia.

A survey of the regulations revealed obstacles in facilitating seamless electronic transactions. For instance, the implementing rules and regulations of the E-commerce Law (Republic Act 8792) provides onerous technical requisites before an electronic signature can be considered legal and valid. Further, existing notarial rules are unable to facilitate a completely remote and electronic notarization procedure.

Meanwhile, the Securities and Exchange Commission (SEC) had expanded investment regulations, such that the scope of the constitutional restriction (foreign participation is absolutely prohibited) on mass media had been applied to most websites and digital platforms. Additionally, SEC gave a broad definition to "mass media" as platforms that "communicate to the public", which essentially renders all websites and online platforms posting content related to third parties as mass media. Public utilities, telecommunications, and education platforms had suffered the same fate. As a result, constitutional restrictions, expanded by statutory and administrative issuances, evolved to impede some digital platforms from receiving foreign funding. The harms sought to be avoided by such limitations may not be relevant to the existing business models of the platform being regulated.

These regulatory gaps could negatively impact digital platforms in two ways. First, they inhibit innovation because uncertainties could limit

funding opportunities and discourage firms from developing or launching novel products. Second, gaps and overlaps could lead to cross-border and domestic regulatory arbitrage, forcing firms to relocate to areas or jurisdictions where risks are more manageable.

Therefore, this paper recommends a recalibration of regulations, taking into consideration the policy objectives on innovation vis-à-vis the protection of Filipino consumers and entrepreneurs. Policymakers could take advantage of regulatory intersections to further innovation policies. They could also consider various interventions to achieve such reforms without necessarily resorting to constitutional changes. For example, through the Philippine Innovation Act (Republic Act 11293), the government could review its taxation, labor, consumer protection, and investment regulations, to ensure that these laws do not stifle innovation.

Introduction

Objectives

This paper presents a survey of regulations relevant to the operation of compliance-driven digital platforms,[1] identifies regulatory gaps and impacts, and recommends possible reforms to address such issues.

Methodology

The 1987 Constitution and Philippine legislation, as well as administrative regulations and policy statements related to digital platforms, were assessed in this study. In particular, policy provisions and objectives and their impact on digital platforms were analyzed. The regulations were then examined in contrast with the recommendations of the United Nations Conference on Trade and Development (UNCTAD) and the Organisation for Economic Co-operation and Development (OECD), specifically on approaches that countries could undertake in formulating legal and regulatory frameworks vis-à-vis the digital economy. Finally, the regulations were also analyzed against the national innovation policy objectives.

UNCTAD and OECD recommendations

In its *Digital Economy Report 2019*, the UNCTAD (2019) recommended that countries adopt baseline regulations on electronic transactions, consumer protection, data protection, intellectual property, and cybercrime to foster online transactions. It also suggested that countries establish policies that facilitate access to funding for digital entrepreneurs. The report also emphasized implementing a whole-of-government approach to unify government agencies in developing the digital economy.

Meanwhile, OECD (2015) recognized that countries have varying conditions for innovation. Hence, a country's choice and combination of innovation policies must be aligned with its capabilities to formulate and implement policies. Essentially, an innovation policy must address specific challenges and drive sustainable and innovation-led growth.

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[1] The terms digital platforms, transaction platforms, and innovation platforms are used interchangeably in this paper.

National innovation policy of the Philippines

In the Philippines, the passage of Republic Act (RA) 11293 or the Philippine Innovation Act provided the foundation for a cohesive regulatory framework. It recognizes the need to harmonize a patchwork of existing regulations and mandates the government to place innovation at the center of its development policies and goals, taking into consideration the country's key advantages and potential opportunities in the regional and global arena. Likewise, RA 11293 encourages innovation and entrepreneurship by streamlining regulatory frameworks and strengthening stakeholder relationships.

The second part of this paper presents a brief survey of relevant laws and regulations on digital platforms focusing on (1) general innovation policy; (2) electronic transactions, including electronic contracting and payments; (3) consumer protection; (4) data protection and data privacy; (5) cybercrime; (6) access to funding; and (7) protection of intellectual property rights. The third part discusses the gaps and the impact of these regulations on digital platforms. Finally, as a contribution to shaping a coherent and viable regulatory policy for digital platforms in the country, some areas for policy consideration and regulatory review were also identified.

Survey of Existing Regulations

General innovation policy

The Philippine Innovation Act and its implementing rules and regulations (IRR) institutionalized the whole-of-government approach to ensure government agencies' policy coherence and effective coordination in the innovation and digitization of micro, small, and medium enterprises (MSMEs) as driver of sustainable growth. The law encourages much greater interaction among the business sector, academe, research institutions, and government agencies.

Moreover, it established the National Innovation Council (NIC), which shall serve as the policy advisory body in developing and coordinating innovation strategies. NIC is also mandated to formulate the National Innovation Agenda and Strategy Document to accelerate

innovation. In addition, NIC is tasked to monitor and assess policies and implement an action agenda in developing the country's capacity for innovation, as measured by the Global Innovation Index (GII) and other indices. GII is an annual report that ranks countries based on their innovation performance and capacity published by Cornell University, *Institut Européen d'Administration des Affaires*, and World Intellectual Property Organization (WIPO).

Regulations enabling electronic transactions

Electronic contracts and electronic transactions

The Electronic Commerce Act of 2000 or RA 8792 provides that electronic transactions have the same legal effect and enforceability as manual transactions. Even before the passage of the E-commerce Act, agreements executed electronically (through email or ticking of checkboxes) are generally recognized as valid and enforceable contracts. Under the Philippine law, however, consent must be demonstrated by the concurrence of two elements—offer and acceptance—to establish a contract. Provided that both elements are present (and assuming that the contract has a valid object[2] and is supported by sufficient consideration), a contract is deemed to exist between the parties and considered valid and enforceable regardless of the medium through which it was executed. Therefore, exchanging emails or messages over a mobile application or even an oral agreement may constitute a valid contract.

However, some laws require certain contracts to follow a specific format to be considered valid and enforceable. For example, the New Civil Code of the Philippines or RA 386 requires certain contracts (e.g., an agreement made in consideration of marriage) to comply with the statute of frauds; otherwise, these may be unenforceable. Under Article 1403 of

[2] For goods to be considered as a valid object in a contract, these must be (1) within the commerce of men (RA 386, Article 1347); (2) not physically or legally impossible (RA 386, Article 1348); (3) in existence or capable of coming into existence (RA 386, Article 1461, 1493, and 1494); and (4) determinate or determinable without the need of a new contract between the parties (RA 36, Articles 1349 and 1460). Meanwhile, for a service to be a valid object, it must be (1) within the e-commerce of men; (2) not physically or legally impossible; and (3) determinate or capable of being determinate (RA 386, Articles 1318 and 1349).

the Civil Code, an agreement made will be unenforceable unless the same, or some note or memorandum thereof, be in writing and subscribed by the party charged or his agent. To comply with the statute of frauds, electronic documents are considered the legal equivalent of written documents.

Philippine laws also treat physical signatures and electronic signatures as equivalent, provided that the requirements for an electronic signature are complied with. Under Section 8 of the E-commerce Act, an electronic signature is legally recognized if the affixing of such signature is proved by showing a prescribed procedure, not alterable by the parties interested in the electronic document.

On the other hand, public documents must still bear physical signatures. The *2020 Interim Rules on Remote Notarization of Paper Documents* issued by the Supreme Court does not provide for a procedure by which notarial acts may be executed through electronic signatures. Under the notarial rules, the parties signing the document must sign by hand in the notary public's presence (physically or through video conference).

Payments and movement of funds

Bangko Sentral ng Pilipinas (BSP) and electronic payments. The central bank allows the use and adoption of cashless payment methods, such as e-money and virtual assets. The BSP thereby requires entities that provide electronic payment and financial services to make their fund transfer functionalities interoperable, such that consumers may send and receive funds across varying platforms. The BSP also requires adopting a national quick response code standard to ensure the efficiency of payment systems in the country and support inclusive economic development (BSP 2019b).

Financial technology businesses that support digital transactions, particularly remittance and transfer companies (including electronic money issuers [EMIs] and virtual asset service providers [VASPs]), are allowed to operate in the country, subject to the procurement of certain licenses. Licensed EMIs may issue e-money, enabling cashless transactions. E-money refers to the monetary value that is (1) electronically stored in an instrument or device (e.g., cash cards, electronic wallets accessible via mobile phone or other access devices, and stored value cards); (2) issued against receipt of funds of an amount not lesser in value than the monetary

value issued; (3) accepted as a means of payment by persons or entities other than the issuer; (4) withdrawable in cash or cash equivalent; and (5) issued in accordance with BSP regulations.

Likewise, the BSP allows the exchange of virtual assets (such as cryptocurrency), provided that these are conducted with licensed VASPs. Section 1 of BSP Circular 1108, series of 2021, defines "virtual asset" as any type of digital unit that can be traded, transferred, and used for payment or investment purposes. Virtual assets are not issued or guaranteed by any jurisdiction and do not have legal tender status. Digital units of exchange that are used for the payment of (1) goods and services solely provided by its issuer or a limited set of merchants specified by its issuer (e.g., gift checks) or (2) virtual goods and services within an online game (e.g., gaming tokens) are not considered virtual assets.

Department of Trade and Industry (DTI) and digital gift checks. Digital platforms may also accept gift checks regulated by the DTI as payments. The Gift Check Act of 2017 or RA 10962 defines a gift check as any instrument (paper, card, code, or other devices) issued to any person for monetary consideration, honored upon presentation at a single merchant or an affiliated group of merchants as payment for goods or services. Closed-loop payment systems like merchant-issued virtual credits meant to be used to pay for the goods or services of said merchants may be considered gift checks.

Unlike e-money, gift checks may not be redeemed or withdrawn as cash. These are also generally not transferable among users. The DTI does not require gift check issuers to register or procure a license. However, BSP regulations on e-money and virtual assets may apply should the closed-loop payment system introduce additional functionalities that enable virtual credit holders to cash out or transfer credits to persons other than the merchant.

Securities and Exchange Commission (SEC) and virtual assets. Virtual assets with characteristics of a security may fall under SEC's jurisdiction. The Securities Regulation Code or RA 8799 includes investment contracts within the ambit of the definition of securities. Under Rule 26.3.5 of its IRR, "investment contracts" are defined as any "contract, transaction, or scheme whereby a person invests his money in a common enterprise and

is led to expect profits primarily from the efforts of others". RA 8799 gives the SEC a broad authority to consider any instrument, including those that are not yet enumerated in existing rules, as securities. The SEC requires the registration of securities before issuance or sale. Further, the issuers of such securities must acquire a license from the SEC.

Digital platforms and consumer protection

The E-commerce Act fills in the gaps in the Consumer Act (RA 7394) by providing penalties under Section 33 for violations of the consumer law and other pertinent laws committed through electronic means. In addition, the Department of Health, the Department of Agriculture, and the DTI also issued Joint Administrative Order 01, series of 2008, prescribing additional rules and regulations on retailers, sellers, distributors, suppliers, and manufacturers engaged in e-commerce.

Likewise, the BSP issued Circular 1048, series of 2019, to protect consumers of financial services. The circular orders BSP-supervised financial institutions (BSFIs) to (1) provide clear disclosures and adequate transparency about the products and services being offered to consumers to allow them to make comparisons and informed financial decisions; (2) protect client information; (3) ensure that financial consumers are treated fairly, honestly, and professionally; (4) implement effective recourse that provides accessible, affordable, dependent, fair, accountable, timely, and efficient means for resolving complaints; and (5) conduct financial education and awareness initiatives that aim to provide consumers knowledge, skills, and confidence to evaluate information, empowering them to make informed financial decisions.

Data privacy and protection

Scope

Digital platforms are subject to data privacy regulation. The processing of personal information is governed by RA 10173, otherwise known as the Data Privacy Act (DPA) of 2012, and its IRR issued by the National Privacy Commission (NPC). Section 3.g of the law provides an expansive definition of "personal information" as it includes any information "from

which the identity of an individual is apparent or can be reasonably and directly ascertained by the entity holding the information, or when put together with other information, would directly and certainly identify the individual".

The DPA covers all types of persons (and entities) that process personal information, regardless of type, size, or income. It will apply even to sole proprietors, informal businesses, and individual professionals and contractors. Generally, the law applies regardless of the citizenship of the data subjects, provided that the processing activity is done in the Philippines or involves Philippine residents. However, Section 6 of the DPA provides for extraterritorial application (i.e., applicability to activities done offshore) of the law when the data subject is a Philippine citizen or resident. Therefore, platforms located offshore may be subjected to the regulatory reach of the NPC.

Some specific types of personal data relating to banking and finance, tax, and employment may also be subjected to bank, labor, and tax laws and regulations. However, the baseline regulation for all types of personal information is the DPA.

Accountability for data processing activities

The DPA primarily imposes the legal obligation for data processing on personal information controllers (referred to in the succeeding pages as controllers). As stated in the principle of accountability under Section 21, controllers will remain responsible for the acts of their contractors or processors. Controllers must ensure that the processing undertaken by subcontractors (whether local or foreign) are compliant with the general data privacy principles of DPA provided under Section 11. Processors may include cloud service providers, telecommunications providers, data management companies, and other subcontractors.

Legal parameters for processing data

The law grants transparency and autonomy rights for data subjects over their personal information. In particular, Section 16.b of the DPA mandates that data subjects should be furnished with information on the (1) description of the personal information entered into a system,

(2) purposes for which the data is processed, (3) scope and method of processing, (4) recipients to whom they may be disclosed, (5) methods utilized for automated access, (6) identity and contact details of the controller, (7) period for which the information will be stored, and (8) existence of the data subjects' rights.

The processing of personal information is permitted, provided that at least one of the conditions enumerated under Section 12 of the DPA is present: (1) the data subject has given consent; (2) the processing is deemed necessary to the fulfillment of a contract with the data subject; (3) the processing is necessary for compliance with a legal obligation; (4) the processing is necessary to protect vitally important interests of the data subject, including life and health; (5) the processing is necessary to respond to national emergency, comply with the requirements of public order and safety, or fulfill functions of public authority that necessarily includes the processing of personal data for the fulfillment of its mandate; and (6) the processing is necessary for the purposes of the legitimate interests pursued by the personal information controller or by a third party or parties to whom the data is disclosed, except where such interests are overridden by fundamental rights and freedoms of the data subject that require protection under the 1987 Philippine Constitution.

On the other hand, the DPA provides stricter requirements for processing sensitive personal information, including an individual's social security number, health records, license details, tax returns, court proceedings, and classified data. Sensitive personal information may only be processed if the data subject has given consent, specific to the purpose of the processing (unless one of the other instances enumerated by law exists). To be valid, consent must be an informed indication of will, freely given, and specific. Implied consent is not permitted. Section 13 of the DPA states that in addition to consent, processing of sensitive personal information may be done if the processing is (1) provided for by existing laws and regulations; (2) necessary to protect the life and health of the data subject or another person; (3) necessary to achieve the lawful and noncommercial objectives of public organizations and their associations; (4) necessary for purposes of medical treatment; and (5) concerns such personal information as is necessary for the protection of lawful rights

and interests of natural or legal persons in court proceedings, or the establishment, exercise or defense of legal claims, or when provided to government or public authority.

Cross-border transfer of data

Existing regulations do not prohibit the transfer of personal information to foreign jurisdictions. There are also no rules requiring data localization. However, consent is generally required if the process includes the transfer of personal information. Further, offshore data processing must accommodate certain audit activities by regulators. Under the National Revenue Code of 1997, as amended by RA 10963, government agencies, such as the Department of Labor and Employment, the Bureau of Internal Revenue, and the BSP, are granted audit powers. By this grant of audit powers, the data and systems stored in offshore locations must be accessible to Philippine authorities.

Location of computing facilities and the use of technology

Meanwhile, there are no regulations that require data localization. Even so, controllers must ensure compliance with the minimum requirements of the DPA and other relevant laws and policies. Hence, if personal data is involved, the controller should inform its data subjects about the offshore transfer. In addition, the entity processing the data should also comply with applicable outsourcing, security, and audit requirements depending on the activity.

There are also no regulations in the Philippines prohibiting private entities from using cloud technology. However, there are guidelines for government agencies and BSFIs on the use of cloud technology.

Government. The Department of Information and Communications Technology (DICT), through its Department Circular 2017-002, declared the Cloud First Policy to direct government agencies to prioritize the use of cloud technology in their infostructure planning and procurement. The policy provides different levels of standards on data processing. For example, nonsensitive or unclassified data may be stored on an accredited public cloud or Government Cloud (GovCloud). Meanwhile, the storage of sensitive personal information, which is considered restricted data,

should meet a higher set of security standards and encryption protocols. In particular, government agencies are advised to utilize private cloud deployments to store or process confidential or above-sensitive data.

Further, the cloud technology used must comply with the security requirements set by the DICT. It must be verified by internationally recognized security assurance frameworks, such as the ISO/IEC 27001, the Service Organization Controls Report 1 and 2, and the Payment Card Industry Data Security Standard. The data must also be encrypted using industry-tested and accepted standards, such as AES (128 bits and higher), TDES (minimum double-length keys), RSA (1024 bits or higher), ECC (160 bits or higher), and ElGamal (1024 bits or higher).

Moreover, NPC Circular 16-01, series of 2016, provides a general rule that government agencies should demonstrate their control framework for data protection and ensure compliance with the DPA. For example, all personal data must be encrypted and must consider NPC's technical requirements, such as the use of AES with a key size of 256 bits as the most appropriate encryption standard. In addition, passwords or passphrases must be of sufficient strength to deter password attacks. All data centers must also be restricted to agency personnel with the appropriate security clearance and access control system that records when, where, and by whom the data centers are accessed. The NPC further recommends using ISO/IEC 27018 as the most appropriate certification for the service or function provided by a service provider.

BSFIs. BSFIs may use cloud storage facilities, but the provider must operate in a jurisdiction that upholds confidentiality. The cloud service provider must also have reliable means to ensure that the BSFI data are processed in the declared jurisdictions. In addition, BSFIs must perform due diligence in assessing the risks presented by the technology to be implemented and reviewing the service provider's financial soundness, reputation, managerial skills, and technical capabilities. While existing regulations do not provide for particular technology requirements, BSFIs are required to formalize the performance standards against which the quantity and quality of the service should be measured (BSP 2017).

Sector-specific regulations on data protection

Financial data. Should BSFIs utilize a third-party service provider, the requirements on outsourcing imposed by the BSP must be complied with. In addition, the contract must specify each party's obligations to comply with the E-commerce Act, Cybercrime Prevention Act, Law on Secrecy of Deposits (RA 1405), Foreign Currency Deposit Act (RA 6426), Anti-Money Laundering Act (RA 9160), General Banking Law (RA 8791), and BSP regulations on information technology risk management, electronic banking services, consumer protection, and data security. The service provider should also grant BSP with audit access (BSP 2017).

Health data. Entities processing health data should be aware of the confidentiality obligations imposed by various statutes. RA 8504 or the Philippine AIDS (acquired immunodeficiency syndrome) Prevention and Control Act of 1998 mandates confidentiality in handling all medical information, particularly the identity and status of persons with human immunodeficiency virus. Similarly, the Magna Carta of Disabled Persons (RA 7277) and the Mental Health Act (RA 11036) mandate confidentiality and provide criminal penalties for the unauthorized access or use of health information.

Cybercrime and security

The Cybercrime Prevention Act of 2012 (RA 10175) penalizes offenses committed using information and communications technology (ICT). Under Section 4 of the law, the following acts are punishable: (1) offenses against the confidentiality, integrity, and availability of computer data and systems, such as illegal access to computer systems, illegal interceptions of computer data, data interference, system interference, and misuse of devices; (2) computer-related offenses, such as forgery, fraud, and identity theft; and (3) content-related offenses, such as cybersex, child pornography, and libel. The law also increased the penalty for crimes defined in the Revised Penal Code and other laws should such crimes be done using ICT. Under Section 6, the penalty for such crimes shall be one degree higher than what is provided for by the Revised Penal Code and other laws.

Mechanisms were also created to force platforms to cooperate in cybercrime investigations. For example, the Supreme Court issued A.M. 17-11-03-SC on the *Rule on Cybercrime Warrants* in 2018 to investigate alleged cybercrime offenses. Under this rule, law enforcement officers could order for disclosure of computer data (such as subscriber information, traffic data, and other relevant data). It may also enable law enforcement personnel to intercept, search, seize, and examine computer data.

Section 13 of the Cybercrime Prevention Act requires service providers (which may include digital platforms) to retain and preserve the integrity of traffic data and subscribers' information for a minimum of six months from the transaction date. Likewise, a service provider must maintain content data for six months from the receipt of an order requiring its preservation from law enforcement authorities.

Access to funding

Existing regulations restrict the ability of Philippine digital platforms to get foreign investments.

Mass media

Under the 1987 Philippine Constitution, ownership and management of mass media are reserved to Filipino nationals or entities wholly owned by Filipinos. Meanwhile, Article 4.at of the Consumer Act defines "mass media" as "any means or methods used to convey advertising messages to the public, such as television, radio, magazines, cinema, billboards, posters, streamers, handbills, leaflets, mails, and the like". After that, the Tobacco Regulation Act of 2003 (RA 9211) added the internet within this definition.

The Department of Justice (DOJ) stated in Opinion 40, series of 1998, that internet platforms cannot be considered mass media since internet business merely serves as a carrier for transmitting information, while mass media is involved in producing news, information, and messages. In contrast, SEC articulated in SEC-OGC Opinion 17-07 that a corporation does not need to be the creator of message or information to be considered a mass media entity. As such, the dissemination of

information to the public is sufficient to constitute a platform as a mass media entity.

In 2018, the Office of the President issued Executive Order (EO) 65, promulgating the Eleventh Regular Foreign Investment Negative List (11th FINL), which declared "internet business" open to foreign ownership, the same not being considered as a mass media activity.

Nonetheless, the SEC clarified in a later opinion, SEC-OGC Opinion 18-21, that "internet business" refers to internet access providers that merely serve as carriers for transmitting messages. Other aspects of the internet, where information is shared and intended to influence the masses, are also covered by the definition of mass media.

In the same opinion, the SEC provided guidelines for ruling out internet platforms as engaged in mass media activities. Firstly, there should be no pervasive or indiscriminate display of any promotional materials on the products or services offered by third-party clients or even by platforms or mobile applications. Secondly, only the following information may be made available in platforms: (1) enumeration of the services offered by platforms; (2) instruction on how to use said platforms; (3) enumeration of third-party partners, but limited to the listing of the name or logo of third-party clients only; and (4) any other information on platforms required by any law or regulatory measure to be disclosed. Lastly, the disclosure of the products and services offered by third-party clients shall only be done to complete the transaction enabled by a platform. This means that platforms featuring products and services provided by users and third parties would still be considered mass media, such as online marketplaces, learning platforms, and other publishers of third-party content. In addition, in SEC-OGC Opinion 16-21, the SEC stated that platforms publishing advertisements would also be considered mass media.

Retail

Section 3.1 of the Retail Trade Liberalization Act of 2000 (RA 8762) defines "retail trade" as "any act, calling, or occupation of habitually selling directly to the general public merchandise, commodities or goods for consumption", subject to certain exceptions. The law also provides

that only Filipino citizens and corporations wholly owned by Filipinos can engage in retail enterprises with paid-up capital of less than USD 2.5 million. Foreign retailers who want to engage in retail must have (1) a paid-up capital of at least USD 2.5 million and a minimum of USD 200 million net worth in its parent corporation;[3] (2) five retailing branches or franchises in operation anywhere in the world;[4] and (3) a retailing track record for at least five years.

The regulation further prohibits foreign retailers from using mobile stores, hiring sales representatives, engaging in door-to-door selling, and performing other similar retailing activities. These requirements prevent foreign retailers with wholly digital operations from operating in the Philippines.

Public utilities

The 1987 Constitution limits foreign equity for public utilities to only 40 percent.

Courier and ride-hailing services. Section 3 of the Postal Services Act of 1992 (RA 7354) states that "parcel delivery" is "a basic and strategic public utility". Thus, courier delivery service is classified under public utilities. Likewise, Section 13.b of Commonwealth Act 146 includes "any common carrier, railroad, street railway, traction railway, subway motor vehicle, either for freight or passenger or both, with or without fixed route" within the definition of "public service". Ride-hailing service providers then fall under the category of public utilities and are subject to constitutional restrictions on foreign participation. This also extends to motorcycle taxis. In 2015, the Department of Transportation (DOTr) released Department Order 2015-011, regulating transportation network companies (TNCs) and transport network vehicle services (TNVS), effectively categorizing ride-hailing platforms as public utilities.

Telecommunications and value-added service providers. Digital platforms may be considered value-added service (VAS) providers, which are classified as public utilities. In Memorandum Circular 02-05-2008,

[3] For high-end luxury goods retailers, the required paid-up capital is USD 250,000 per store, and the parent company must have at least USD 50 million net worth in its parent corporation.

[4] This requirement is not applicable if a retailer has a minimum of one store with a capitalization of at least USD 25 million.

the National Telecommunications Commission identified the following services as VAS: (1) audio and video conferencing services; (2) electronic mail services; (3) information services, including all types of information delivered to or accessed by the users and subscribers, such as road traffic information and financial information; (4) electronic gaming services; (5) applications service, including mobile banking and payment services; and (6) content and program services, including all types of content delivered to and accessed by users, such as music, ring tones, logos, and video clips.

VAS providers are generally considered public utilities subject to certain exceptions. According to DOJ Opinion 2, series of 2009, a VAS provider is only considered a public utility if it extends its services to the general public. On the other hand, a VAS provider cannot be regarded as a public utility if it extends its services to an existing telecommunications company. Therefore, the nationality requirement imposed under the 1987 Constitution will only apply to the first but not the second entity.

Education: Learning platforms

Educational institutions, except those established by religious groups and mission boards or those providing short-term high-level skills development that are not part of the formal education system, are subject to a 40-percent foreign equity limit (Article XIV, Section 4 of the 1987 Philippine Constitution; EO 65).

Relevant to digital platforms is the inclusion of "work education" or "practical arts" within the classification of a formal education system. Section 24 of *Batas Pambansa* 232 defines "work education" or "practical arts" as "a program of basic education, which aims to develop the right attitudes toward work"; and "technical-vocational education" as "post-secondary but nondegree programs leading to one-, two-, or three-year certificates in preparation for a group of middle-level occupations".

This statutory definition renders online course providers educational institutions that are part of the formal education system and, therefore, subject to restrictions on foreign equity. In SEC-OGC Opinion 17-05, SEC extended the definition of "educational institution" to online language and diving tutorial services providers.

The 1987 Philippine Constitution and EO 65 also exempt services that are "for short-term high-level skills development" from the restriction. However, no definitive guidance regarding the definition of "short-term high-level skills development" has been provided.

Others

Grants and government investment funds. The Philippine Innovation Act created an innovation fund to be given to enterprises as grants. The IRR of the law provides for the establishment of a credit and financing program by requiring all banks to allot at least 4 percent of their total loanable funds for innovation development credit. The program will finance new technology development, product innovation, process innovation, organizational innovation, and marketing innovation. This is further supplemented with the grants and investment funds intended for startups under RA 1137 or the Innovative Startup Act.

Personal property as security. The Personal Property Security Act or RA 11057 established a unified and modern legal framework for securing obligations using personal properties. This law allows the use of any personal property (including intangible rights and intellectual property rights) as a security in a simple and affordable manner. This law is expected to promote economic activity by increasing access to low-cost credit.

Intellectual property rights

Basic legal framework

The Philippines is a signatory to treaties that enable intellectual property (IP) owners to seek international protection for their rights, such as the Berne Convention for the Protection of Literary and Artistic Works; Paris Convention for the Protection of Industrial Property; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations; Patent Cooperation Treaty; Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks; and Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled.

The Philippines is also a member of the WIPO and the World Trade Organization (WTO). By virtue of its WTO membership, the Philippines is also a signatory to the Agreement on Trade-Related Aspects of Intellectual Property Rights.

Protecting inventions and codes

A copyright protects creative works, including software codes, from the moment of creation without the need to register them. On the other hand, a patent protects inventive products and processes that provide technical solutions to a problem.

IP rights owners may take advantage of the various treaties that the Philippines is a part of to extend their IP protection to offshore jurisdictions. Depending on the work sought to be protected, the protection may be in the form of copyright, trademarks, trade secrets, patents, designs, or utility models.

In the GII 2020, the Philippines ranked 50th among 131 economies, a notable improvement from its 2019 (54th) and 2018 (73rd) rankings. However, compared to its neighbors in the Association of Southeast Asian Nations (ASEAN), the country ranked lower than Singapore (8th), Malaysia (33rd), Viet Nam (42nd), and Thailand (44th). GII ranks world economies according to their innovation capabilities based on several pillars, such as (1) institutions, (2) human capital and research, (3) infrastructure, (4) market sophistication, (5) business sophistication, (6) knowledge and technology outputs, and (7) creative outputs (Cornell University et al. 2020). In addition, the Philippine Innovation Act explicitly mentions GII as a benchmark for innovation policy.

The Intellectual Property Office of the Philippines (IPOPHL) cited the increase in the number of invention and utility model filings as the reason for the country's improved ranking in GII. IPOPHL also noted government efforts to encourage IP protection filings, such as the growth of Innovation and Technology Support Offices (ITSO), composed of 100 higher education institutions and research development centers equipped with in-house patent libraries (Lim 2020). WIPO has lauded IPOPHL's management of ITSOs as a model that other economies can replicate (IPOPHL 2019).

Tables 1 and 2 present the performance of the Philippines on knowledge and technology outputs and business sophistication vis-à-vis its ASEAN neighbors. Although Singapore, Malaysia, Viet Nam, and Thailand placed higher than the Philippines in the overall rankings, the Philippines remains relatively competitive in these two areas.

Table 1. GII: Knowledge and technology outputs, selected ASEAN countries, 2020

	Knowledge and Technology Outputs	Knowledge Creation[1]	Knowledge Impact[2]	Knowledge Diffusion[3]
Philippines	26th	65th	34th	8th
Singapore	1st	1st	2nd	17th
Malaysia	38th	70th	22nd	18th
Viet Nam	37th	75th	21st	14th
Thailand	44th	54th	32nd	36th

GII = Global Innovation Index; ASEAN = Association of Southeast Asian Nations; PPP = purchasing power parity; USD = United States dollar; GDP = gross domestic product; PCT = Patent Cooperation Treaty; ISO = International Organization for Standardization; ICT = information and communications technology; FDI = foreign direct investment

[1] Consists of patents by origin/billion PPP USD GDP, PCT patents by origin/billion PPP USD GDP, utility models by origin/billion PPP USD GDP, scientific and technical articles/billion PPP USD GDP, and citable documents H-index.

[2] Consists of growth rate of PPP USD GDP/worker (%), new business/1,000 population aged 15–64, computer software spending (%) GDP, ISO 9001 quality certificates/bn PPP USD GDP, and high and medium-high technology manufacturing (%).

[3] Consists of intellectual property receipts (%) total trade, high-technology net exports (%) total trade, ICT services exports (%) total trade, and FDI net outflows (%) GDP.

Source: Cornell University et al. (2020)

Table 2. GII: Business sophistication, selected ASEAN countries, 2020

	Business Sophistication	Knowledge Workers[1]	Innovation Linkages[2]	Knowledge Absorption[3]
Philippines	29th	45th	64th	7th
Singapore	6th	7th	18th	2nd
Malaysia	31st	53rd	33rd	22nd
Viet Nam	39th	63rd	75th	10th
Thailand	36th	51st	6th	15th

GII = Global Innovation Index; ASEAN = Association of Southeast Asian Nations; GDP = gross domestic product; GERD = gross domestic expenditure on research and development; PPP = purchasing power parity; ICT = information and communications technology; FDI = foreign direct investment

[1] Consists of knowledge-intensive employment (%), firms offering formal training (%), GERD performed by business % GDP, GERD financed by business (%), and females employed with advanced degrees.

[2] Consists of university/industry research collaboration, state of cluster development, GERD financed by abroad (%) GDP, joint venture strategic alliance deals, and patent families 2+ offices/billion PPP (%) GDP.

[3] Consists of intellectual property payments (%) total trade, high-technology imports (%) total trade, ICT services imports (%) total trade, FDI net inflows (%) GDP, and research talent (%) in business enterprise.

Source: Cornell University et al. (2020)

Safe harbor provisions

Regulations provide protection for digital platforms that may unknowingly host infringing content. Under the E-commerce Act and the Intellectual Property Code, platforms will not be held liable for copyright infringement unless the platform has actual knowledge or is aware of the facts or circumstance that the material it published is unlawful or infringes any rights; or the platform knowingly receives financial benefit directly attributable to the unlawful or infringing activity.

The safe harbor provision also incentivizes digital platforms to develop mechanisms that protect IP rights. This could include copyright infringement notifications and take-down procedures and active efforts on the part of the platform to discourage the use of infringing content.

Analysis of Regulatory Gaps

Enabling regulations

The country's laws and policies on e-commerce, payments, consumer protection, data privacy, and cybersecurity generally create an enabling environment for digital platforms. Intellectual property regulations also protect technology developers.

Meanwhile, e-commerce regulations give legal recognition to electronic transactions and contracts. Further, payments regulations have been adaptive to novel technologies and business models. Mobile payments, e-money, and virtual assets are regulated and allowed. Entities that provide electronic financial services are required to make their fund transfer functionalities interoperable with other market participants, thus reinforcing such services.

The BSP has been able to work closely with market participants when crafting regulations. In 2004, the central bank developed a sandbox for mobile payments, which eventually contributed to the e-money regulations issued in 2009 (Villa 2018). The absence of legislation on electronic financial services and money service businesses did not paralyze the BSP in enabling firms' operations involved in the movement of funds. Formal legislative authority on payments was only granted to the BSP in 2018 with the passage of RA 11127, also known as the National Payment

Systems Act. Before this, rules on payment and remittance activities have solely been regulated through administrative issuances. These administrative regulations allowed remittance businesses to operate legally even without a supporting law directly providing for the same.

The DPA addresses data privacy and provides autonomy to data subjects, allowing them to control how their personal data are processed. This accountability regime forces controllers to ensure that its partners in other jurisdictions are compliant. In addition, the stringent provision of the law enables Philippine digital platforms to process data from jurisdictions with strict data privacy regimes and transfer data legally offshore.

Cybercrime regulations further push platforms to act more responsibly by providing provisions that would obligate them to cooperate with law enforcement agencies in evidence-gathering and by delivering higher penalties for offenses committed through the use of ICTs.

Regulatory gaps and constraints

While Philippine regulations provide an enabling environment for digital platforms, there are still areas that slow down the adoption and implementation of digital transactions.

Electronic contracts

The lack of rules on electronic notarization limits the types of contracts that may be executed electronically.

Telecommunications

As discussed, digital platforms fall within the definition of VAS providers and, therefore, must obtain prior registration with the NTC before offering services. The application of such controls to digital platforms needs to be reevaluated. Providing ex-ante regulations may make sense for telecommunications where intensive capitalization is necessary to provide services. In systems like this, the government may need to provide assistance to telecommunication entities to recoup their investments. However, such assumptions do not apply to digital platforms, which are more democratized—any person with internet access can provide online services.

Data protection

The OECD set forth certain principles regarding national policies on data privacy, such as guidelines and limitations on data process, data quality, purpose specification, individual participation, and accountability. Generally, the DPA satisfies the basic principles of national privacy policies provided in the *OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data.* However, despite efforts by Philippine regulators to ensure that the country's data protection regime is on par with global standards, the ability of local platforms to transfer data is hampered by the divergence in data protection regulations among different jurisdictions. In the absence of more robust regional data protection frameworks, platforms must comply with the minimum data protection requirements in all jurisdictions that they are operating in.

Investments and funding

UNCTAD recommended formulating and implementing a policy that enables entrepreneurs in digital platforms to access funding other than those provided by traditional financial institutions. This includes grants, loans, incubators, and venture capital. However, it is difficult for platforms to tap private venture capital due to regulations that treat digital platforms as mass media and VAS providers.

If a digital platform is found violating the policy on foreign equity restrictions, it may face administrative penalties (from payment of fines to suspension or revocation of business license). The directors and officers of a company may also face civil and criminal penalties. However, despite the number of SEC opinions issued to the effect that platforms may be classified as mass media, foreign platforms remain operational in the Philippines. There has been no enforcement action against digital platforms for violating foreign equity policy until the SEC mass media case in 2018.[5] Weak and inconsistent enforcement action increases regulatory uncertainty faced by platforms vis-à-vis mass media regulations.

[5] In SP Case 08-17-001, SEC classified social media news network *Rappler* as a mass media entity. Therefore, *Rappler* is prohibited from entering into an arrangement that would grant foreign investors control over the company.

Foreign investment restrictions are driven by the desire to protect the interest of both the Filipino consumer and producer. Article XII, Section 1 of the 1987 Constitution reiterates that "the State shall protect Filipino enterprises against unfair foreign competition and trade practices." During the 1986 Constitutional Commission debates, Commissioner Bernardo Villegas stated that "the government can declare as unfair anything that hurts Filipino enterprises and that the word 'unfair' does not partake of any unique economic or legal interpretation given by international organizations" (Bernas 2009, p.1176). Commissioner Joaquin Bernas clarified that despite such language, "there is no intention to protect Filipino industries from foreign competition at the expense of consumers" (Bernas 2009, p.1176). Later on, laws (such as the Retail Trade Liberalization Act and the Foreign Investments Act) that implement foreign participation limitations have recognized the need to promote consumer welfare and enable Philippine goods and services to be globally competitive. These laws have also encouraged foreign investments in enterprises that significantly expand livelihood and employment opportunities and promote the welfare of Filipinos.

The rationale behind the strict regulation on mass media may have been crucial in the mid-1900s, when there were limited channels by which information may be communicated. The state had to make sure that foreign entities were not controlling mass media. However, the harms that were sought to be avoided back then may no longer be applicable in the new era where the channels and costs of communication are rendered unlimited and free.

Similarly, there may be merits in regulating technology companies that facilitate transportation services to ensure the safety of the riding public. However, barriers to entry for technology enablers, as opposed to operators that directly provide the transportation service, may have to be adjusted.

Regulatory overlaps

Due to the broad scope of services that digital platforms offer, a transaction or activity may fall concurrently within the jurisdiction of two or more regulators. For example, virtual assets are generally within the purview of the BSP. However, securities policies give SEC authority to regulate virtual assets (i.e., those that function as securities). Also

included in the picture is the DTI, which regulates virtual gift checks. This potential regulatory overlap may be costly to a platform considering that both SEC and BSP require compliance with ex-ante regulations before an entity can commence its operations.

There is also an overlap in the regulation of motorcycle couriers and motorcycle taxis. While the DICT regulates parcel delivery, the DOTr regulates public transportation. Motorcycle taxis usually provide both courier and transportation services, thereby putting them under the jurisdiction of both the DICT and DOTr. The regulatory framework for motorcycle taxis and ride-hailing services is further underpinned by the inability of existing regulations to (1) accommodate companies that merely provide the technology or platform to enable transport services and (2) regulate two-wheeled vehicles as public transportation services.

However, the brief history of Philippine ride-hailing applications demonstrates that, after initial bans, regulators eventually manage to issue interim administrative regulations to allow the temporary operations of such services. For example, when Uber launched in the Philippines in 2014, both the House of Representatives' committee on transportation and the committee on Metro Manila development deemed it unfair that Uber could provide the same service as taxis without any regulation (Cupin 2014). Eventually, however, the DOTr released Department Order 2015-011 to include TNVS and TNCs in the list of public conveyances, thereby making the Philippines the first country in the world to regulate and legalize Uber operations (*Aljazeera America* 2015).

Similarly, the Land Transportation Franchising and Regulatory Board and the Philippine National Police have initially cracked down and apprehended motorcycle taxis for being considered *colorum* or illegally operating (*CNN Philippines* 2017). Eventually, the DOTr created a technical working group and launched a pilot test for motorcycle taxis in 2019 (Galvez 2019).

Impact

Funding and innovation

Various studies confirmed that startups in Southeast Asia face funding challenges. Using data from the World Bank Enterprise Survey in ASEAN countries, OECD (2020) pointed out that 1 in 6 firms in Cambodia,

Indonesia, and Laos, and 1 in 10 firms in Malaysia, Myanmar, Philippines, and Viet Nam cited access to finance as a major constraint. Similarly, in the ASEAN-Republic of Korea Startup Ecosystem study, members of the ASEAN Coordinating Committee on MSMEs identified the following as constraints to startup development: (1) access to capital; (2) access to talent; (3) burdensome regulations, including overlapping regulations across sectors; and (4) access to mentoring networks and advisory services (ASEAN 2020). The *e-conomy SEA Report 2019* released by Google et al. (2019) noted the presence of regulatory uncertainties in e-commerce in the Philippines, Malaysia, and Thailand, particularly with regard to strict licensing schemes imposed on ride-hailing services. The report cited the regulatory uncertainties in these countries as a factor in the relatively low funding they receive.

As shown in Table 3, the Philippines has been lagging from its ASEAN neighbors in terms of the total volume of investments and number of investment deals in the internet sector (Google et al. 2020).

Although access to funding is a regional challenge, the Philippines is unable to generate as much investment deals as its neighboring countries. For example, in the first half of 2020, the Philippines was only able to close 22 deals valued at USD 169 million, while Indonesia and Singapore were able to close 202 (valued at USD 2.8 billion) and 325 (valued at USD 2.5 billion) deals, respectively.

Table 3. Volume and number of deals, selected ASEAN countries

	2018		2019		First Half of 2020	
	Deal Value (in USD million)	Number of Deals	Deal Value (in USD million)	Number of Deals	Deal Value (in USD million)	Number of Deals
Philippines	310	57	221	72	169	22
Indonesia	3,800	349	3,200	355	2,800	202
Malaysia	403	164	373	147	267	61
Singapore	9,100	581	7,100	675	2,500	325
Thailand	125	118	183	110	199	45
Viet Nam	351	137	935	151	327	73

ASEAN = Association of Southeast Asian Nations; USD = United States dollar
Source: Google et al. (2020)

Regulatory uncertainties and vacuums also affect the ability of firms to roll out products (Lev-Aretz and Standburg 2020). In 2013, American multinational technology company Amazon decided to set up its drone research and development center in Canada and the United Kingdom, where it is permitted to operate drones. During this time, the Federal Aviation Administration (FAA) in the United States (US) had imposed strict rules on unmanned aerial activity (Murgia 2017). The US Congress eventually ordered the FAA to issue more permissive regulations for drone testing in 2018.

Closer to home, the issuance by the Cagayan Economic Zone Authority (CEZA) of a licensing regime for offshore cryptocurrency operations attracted investment commitments of USD 8.13 billion in 2018 (Campos 2019). As a result, cryptocurrency exchanges worldwide were willing to comply with CEZA's capitalization and investment requirements in exchange for the opportunity to be recognized by a government regulator.

This experience is also seen in ride-hailing services and motorcycle taxis in the ASEAN region. In Indonesia, the Ministry of Transportation banned motorcycle taxis and mobile-application taxis in 2015 due to the absence of enabling regulations. Encouraged by public demand, the government eventually overturned the ban and allowed the operation of Gojek pending the formulation of rules for motorcycle taxis, which were ultimately released in March 2019 (Yasmin 2019). Similarly, in January 2020, Malaysia allowed Gojek and Malaysian-startup Dego Ride to operate under a proof-of-concept (POC) basis. While the government works on drafting legislation to govern bike-hailing, the POC period enables the authority and participating firms to collect data and gauge the demand for the service (*The Straits Times* 2020).

Regulatory arbitrage

The level of regulatory risk in one jurisdiction could prompt business entities to locate in another area where risk is more manageable. It could also force platforms to redefine themselves cosmetically to take advantage of less stringent regulations within a single jurisdiction.

Cross-border arbitrage: Doing business in the Philippines. Risk-averse digital platforms and those that want to take in foreign equity or provide participation rights to foreigners may resort to different levels of regulatory arbitrage in the Philippines.

Absolute relocation. A Philippine-based digital platform may decide to locate and operate in an offshore jurisdiction (called preferred jurisdiction) with friendlier regulations, devoid of any contact in the Philippines. As a result, the digital platform will not hire service providers in the Philippines; neither will it market or provide any product or service.

Absolute relocation may be an attractive option for platforms whose business model is considered unlawful in the jurisdiction being considered. In the Philippines, for instance, platforms with foreign participation that serve advertisements and publish third-party content may choose to relocate to other jurisdictions due to the restrictive regulations on mass media and VAS.

However, even compliant platforms may still provide services and earn revenue from the Philippines, albeit unintentionally, due to the borderless nature of platform services. Therefore, unless local regulators block access to the platforms' websites, consumers in the Philippines may continue to access such services.

Hub relocation. Platforms may also maintain limited operations for certain aspects of their business in the Philippines. A digital platform may relocate its head office in a preferred jurisdiction and, at the same time, maintain a presence in the Philippines to take advantage of certain regulations. The relatively low-cost labor market in the Philippines may encourage digital platforms to retain their service centers in the country. Special economic zones and related tax incentives are also contributing factors. However, these local companies would only be allowed to provide the following outsourced services to their principal: software development, customer support, contact centers, and back-office support. While such activities may benefit the labor market, these will not directly spur the development of local digital platforms or products.

An example of hub relocation is when Facebook relocated to Ireland to take advantage of the country's tax regime. Interestingly, to minimize its obligations under the General Data Protection Regulation

in the European Union, Facebook modified its terms and conditions to state that data will be processed in the US (with weaker data protection regulations), although its headquarter is in Ireland (*BBC* 2018).

Fictional relocation. Some digital platforms may opt not to organize a body corporate in the Philippines yet continue to engage in business in the country. This is similar to a hub relocation, but instead of maintaining cost centers, a digital platform would keep active operations in the Philippines instead by providing goods and services to customers. Such platforms may also maintain personnel in the country without creating an employer-employee relationship and classify the workers as independent contractors instead.

Despite regulatory restrictions, one factor that possibly makes it desirable for digital platforms to maintain a presence in the Philippines is the country's consumer market size. As shown in Table 4, the Philippines, which has 68 million internet users, has the second-highest number of internet users in the ASEAN after Indonesia, with152 million internet users (Google et al. 2019).

Digital platforms may set up logistic and marketing hubs to serve Filipino consumers. This arrangement may be structured such that sales transactions occur offshore, and only fulfillment services are done locally. Since sales are concluded offshore, the platforms may avoid paying taxes arising from such transactions.

Implementing any of the three subtypes of cross-border arbitrage involves potential revenue losses for the Philippine government. While

Table 4. Internet users, selected ASEAN countries, 2019

Country	Number of Internet Users
Philippines	68 million
Indonesia	152 million
Malaysia	26 million
Singapore	5 million
Thailand	47 million
Viet Nam	61 million

ASEAN = Association of Southeast Asian Nations
Source: Google et al. (2020)

the digital platforms may earn from Filipino consumers, the government's ability to impose taxes and enforce regulations is weakened. Moreover, enforcing consumer protection regulations and other relevant laws beyond national borders could be challenging for the government. Thus, the absence of a local entity could pose potential harm to consumers.

On the other hand, operating both in the Philippines and in the preferred jurisdiction could lead to labor inequalities, such that the hiring of personnel in two different jurisdictions would subject employees to different labor laws and standards.

Regulatory arbitrage within the Philippines

Entities may take advantage of jurisdictional overlaps and loopholes within the Philippines to minimize legal obligations. For example, in banking and payments service, a digital platform may design its e-money systems to mirror gift check features to escape stringent BSP regulations. Similarly, the issuer of a crypto token with investment contract features may insist that it is merely a virtual currency and not a security to evade SEC regulations.

In transportation and shared services, digital platforms have resorted to classifying service providers as independent contractors. This enables platforms to deny employer-employee relationships with their workers to minimize expenses in providing mandatory employment benefits (e.g., occupational safety and health requirements, minimum wage requirements, and premium pay on overtime and night differentials).

Policy Considerations and Recommendations: A Way Forward

Policy coherence: A whole-of-government approach

The level of needed regulatory reforms in the Philippines depends on the country's policy objectives concerning digital platforms and technologies, considering their possible effects on taxation, consumer protection, data privacy, and labor. In cooperation with private stakeholders, the Philippine Innovation Act mandates government agencies to address innovation policies in consideration of other areas that could affect

the public. The law presents an opportunity to recalibrate the existing legal framework on innovation. Government agencies are required to implement a whole-of-government approach to ensure policy coherence and effective coordination in program delivery.

Regulatory reviews should also consider the *Philippine Development Plan 2017–2022*, which recognizes that regulatory policy should promote competition, reduce barriers to entry (including regulatory burden and cost), and ensure consumer protection.

The stifling effect of regulations on innovation may not always mean failure of these regulations, but it may also be considered a sign that regulations are working (Lev-Aretz and Standburg 2020). This paper recognizes valid policy considerations to push for regulations that have the unfortunate effect of adding compliance burdens. These include rules concerning security standards or privacy protection or capitalization and insurance requirements for transportation providers.

Regulatory intersection

This paper does not recommend eliminating regulatory overlaps or subjecting digital platforms to a singular regulator. As Ahdieh (2006) argued, each regulator possesses expertise in their respective areas. Jurisdictional overlaps among regulators may also provide a better understanding of the regulation subjects.

However, regulatory overlaps may pose some disadvantages, as discussed comprehensively by Aagaard (2011). These may present duplication, wherein multiple regulators are given similar authorities and policy objectives. Duplications are inefficient and a waste of government resources that may also result in conflicting regulations, undermining the effectiveness of regulations and increasing compliance burden. Nonetheless, citing several scholars, Aagaard (2011) argued that the factors that make regulatory overlaps undesirable are also the reasons that bring advantages. Redundancies increase the reliability of regulations by disincentivizing errors. Regular interactions among regulators involving subject matters relevant to each agency will also encourage policy innovation by allowing regulators to exchange strategies. Overlaps also create regulatory safety nets, which guard

against scenarios where a regulator may be unduly influenced by a single group (Engel 2006). This may be especially relevant in the digital economy, where informational asymmetries and market share present potential antitrust issues.

Instead of balkanizing industries or activities, policymakers may consider creating frameworks that regulatory bodies may adopt when faced with overlaps. For example, policymakers could provide regulatory bodies with guidance and systemic support in dealing with a platform that may be under several government agencies' jurisdiction. They may also consider various modalities that will induce the benefits of overlap instead of aiming for exclusive allocation of regulatory jurisdictions.

Regulators in the financial services (e.g., SEC, BSP, the Insurance Commission, and the Philippine Deposit Insurance Corporation) have voluntarily organized the Financial Sector Forum to provide an institutionalized framework in coordinating the regulation of the financial system. This helps the agencies preserve and fulfill their respective mandates. The forum also provides a venue for the agencies to update each other on the latest developments in their respective industries and any concerns that may have systemic repercussions (Funa 2017).

In the area of intellectual property protection, the National Committee on Intellectual Property Rights (NCIPR), composed of the IPOPHL, DTI, DOJ, NTC and eight other agencies[6], has been formed to formulate policies on intellectual property enforcement.

Regulatory interventions

Studies on whether regulation (and what level of regulation) is necessary to achieve policy objectives should also be conducted regularly and continuously. There may be instances where a wait-and-see approach is more advisable rather than implementing a full legislative action. For example, legislators and regulators may be tempted to enact laws and policies on new technologies immediately. However, a preemptive action

[6] NCIPR member-agencies include the Bureau of Customs, the Food and Drug Authority, the National Bureau of Investigation, the Philippine National Police, the Optical Media Board, the National Book Development Board, the Office of the Special Envoy on Transnational Crime, and the Department of the Interior and Local Government.

may lead to poorly written regulations that could hamper the growth of nascent industries. For example, in the US, preemptive regulations crippled the development of the cable television industry (Wu 2011). Regulating too early without sufficient information on the subject matter and its potential harm to society could stifle innovation.

There is a need to reevaluate regulations on mass media and VAS. Regulators may only consider implementing stricter requirements when a platform poses harm to information or communication systems.

Regulators may use various tools to provide oversight, including advisories and guidelines on best practices and consultations with industry participants. Regulators may also resort to sandbox regimes and experimentations. This will enable the government to supervise new technological developments and study their effect on market and consumer interests while still allowing the underlying technology to operate and grow.

The BSP is currently implementing regulatory sandboxes and is also taking a light-touch approach on payment systems. The BSP requires payment system platforms to register, but the process is not onerous and may simply be done by submitting a form online along with basic supporting documents. This approach permits the BSP to determine down the line whether a payment system may pose systemic risks and should be subjected to more stringent regulations.

The rules on the conduct of sandboxes should also allow simultaneous participation of all regulatory bodies involved in the subject matter. Such interaction will permit regulators to determine how each of them may navigate through the overlaps. Regulatory sandboxes may provide policymakers with a venue to understand the subject matter and, thus, design rules that can spur technology and, at the same time, protect the public against harm. To further encourage the implementation of regulatory sandboxes, the Congress may need to issue enabling laws that will authorize regulators to consider similar approaches. Such legislative support may be required to remove the liability exposure of government agencies accused of failing to enforce regulations against market players that fail to comply with various regulatory limitations and restrictions in a sandbox.

The level of intervention will also depend on the legal basis of the questioned regulations and time constraints. Constitutional amendments may take longer, but these may not be necessary if the restrictions and gaps are lifted through a more straightforward legislative or regulatory action. Except for retail, the investment restrictions discussed in this paper are grounded in the 1987 Constitution. However, the extension of these restrictions to digital platforms is attributable to legislative acts from Congress and administrative issuances from regulators. These restrictions may therefore be lifted through legislation and regulatory actions.

Conclusion

Regulations may restrict foreign participants from entering the Philippine economy and hamper business models, in which case the negative impact of regulations on innovation becomes starker. Moreover, due to network effects and advantages enjoyed by early entrants, burdensome regulations may stunt homegrown platforms that cannot launch services at the pace of their competitors.

Certain regulatory frameworks in the Philippines can address innovation roadblocks by implementing adaptive regulations and engaging in sandbox experimentation, along with the regulators' ability to manage overlaps and willingness to engage with stakeholders. However, the government needs to recalibrate specific regulations to address unintended anti-innovation effects. Alongside the government's general innovation strategy, reforms should consider the impacts of digital platform regulations on other areas, such as taxation, consumer protection, and labor welfare. Policymakers should also provide regulatory bodies with tools and frameworks that shall allow them to navigate uncertainties and overlaps.

Addressing the weakness in the country's regulatory framework will hopefully create a more enabling environment for Philippine digital platforms to be more competitive, in line with the country's innovation policy, leading to inclusive and sustainable economic growth.

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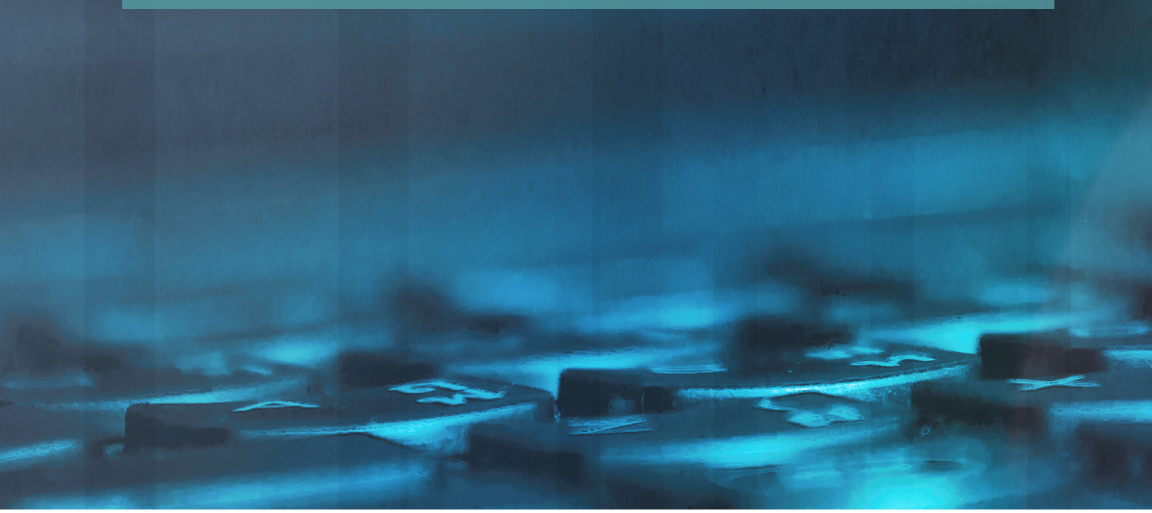
The Author

Atty. Aiken Larisa Serzo is a consultant at the Technology Law and Policy Program of the University of the Philippines (UP) Law Center. She is a lawyer at the Disini Law Office, where she leads the firm's fintech practice and legal education and policy initiatives for Philippine startups. She received her Juris Doctor degree from the UP College of Law. Her work as a lawyer focuses on fintech, tech arrangements, data protection, and emerging media. She regularly leads regulatory, transactional, and corporate investment projects. She was cited as a Next Generation Lawyer for Technology, Media, and Telecommunications from 2017 to 2019 in the Legal 500.

This study reviews Philippine regulations governing digital platforms with cross-border operations and the impacts of these laws on the ability of platforms to innovate and participate in the global economy. There is no shortage of constitutional, statutory, and policy support for innovation, e-commerce, digitization, and entrepreneurship. However, there is a disconnect between these policies and the environment created by how implementing statutes and regulations evolved. These regulatory gaps could negatively impact digital platforms in two ways. First, they inhibit innovation because uncertainties could limit funding opportunities and discourage firms from developing or launching novel products. Second, gaps and overlaps could lead to cross-border and domestic regulatory arbitrage, forcing firms to relocate to areas or jurisdictions where risks are more manageable. Therefore, this paper recommends a recalibration of regulations, taking into consideration the policy objectives on innovation vis-à-vis the protection of Filipino consumers and entrepreneurs. Policymakers could take advantage of regulatory intersections to further innovation policies. They could also consider various interventions to achieve such reforms without necessarily resorting to constitutional changes. The government could review its taxation, labor, consumer protection, and investment regulations, ensuring that these laws do not stifle innovation.



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Surian sa mga Pag-aaral Pangkaunlaran ng Pilipinas

18th Floor, Three Cyberpod Centris - North Tower
EDSA corner Quezon Avenue, Quezon City, Philippines
Tel.: (+632) 8877-4000
Email: publications@mail.pids.gov.ph
Website: http://www.pids.gov.ph

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